

YAVAPAI COUNTY ATTORNEY'S OFFICE
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9:00 **FILED** o'clock A m
MAY 2 2010
BY JEANNE HICKS, Clerk
Deputy

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S RESPONSE TO DEFENDANT'S
BENCH MEMO REGARDING BURDEN
OF PROOF INSTRUCTION IN
PRELIMINARY INSTRUCTIONS
PROPOSED BY THE DEFENSE FILED
MAY 10, 2010

The State of Arizona, by and through Sheila Sullivan Polk, Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Bench Memo Regarding Burden of Proof Instruction and requests that Defendant's requested jury instruction be denied. The State's position is supported by the following Memorandum and Points of Authority.

MEMORANDUM OF POINTS AND AUTHORITIES

I. The State filed its proposed jury instructions.

The State filed its Proposed Jury Instructions on May 4, 2010. A copy of the requested instructions is attached hereto.

II. Defendant's proposed preliminary instruction is not consistent with Arizona law.

Defendant asks this Court to ignore the law and substitute a federal jury instruction

1 for the clearly-mandated instruction. In *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995)
2 the Arizona Supreme Court directed that trial courts give a specific, uniform instruction on
3 reasonable doubt. That instruction is as follows:

4 The state has the burden of proving the defendant guilty beyond a reasonable
5 doubt. In civil cases, it is only necessary to prove that a fact is more likely true
6 than not or that its truth is highly probable. In criminal cases such as this, the
7 state's proof must be more powerful than that. It must be beyond a reasonable
8 doubt.

9 Proof beyond a reasonable doubt is proof that leaves you firmly convinced of
10 the defendant's guilt. **There are very few things in this world that we know**
11 **with absolute certainty, and in criminal cases the law does not require**
12 **proof that overcomes every doubt.** If, based on your consideration of the
evidence, you are firmly convinced that the defendant is guilty of the crime
charged, you must find him/her guilty. If, on the other hand, you think there is
a real possibility that he/she is not guilty, you must give him/her the benefit of
the doubt and find him/her not guilty.

13 182 Ariz. at 596, 898 P.2d at 974. The instruction is to be given in every criminal case. *Id.*
14 Furthermore, the instruction should be given exactly as written without any modification.
15 *State v. Sullivan*, 205 Ariz. 285, 69 P.3d 1006 (App. 2003). The Sullivan court stated:

16 Nowhere in the [*Portillo*] opinion is there any hint that a trial court may
17 modify the instruction in any substantive way. And we certainly do not have
18 the authority to sanction any such modification. To the contrary, we are
19 constrained by the decisions of our supreme court and are not permitted "to
20 overrule, modify, or disregard them." *City of Phoenix v. Leroy Liquors*, 177
21 Ariz. 375, 378, 868 P.2d 958, 961 (App.1993). Allowing modification by the
trial court also is directly contrary to one of the fundamental purposes of the
instruction itself: to provide a "single, uniform instruction" so as to avoid error.
Portillo, 182 Ariz. at 596, 898 P.2d at 974.

22 [6] ¶ 16 In this case, there is no question that the trial court erred by
23 removing a portion of the mandated *Portillo* instruction and replacing it with
24 language of its own choosing. The error is clear. The question becomes, what
25 do we do with it? Is it subject to a harmless error analysis or does it constitute
26 structural error?

205 Ariz. at 288, 69 P.3d at 1009.

Defendant's attempts to mislead this Court are disturbing. Specifically, he stated, "As

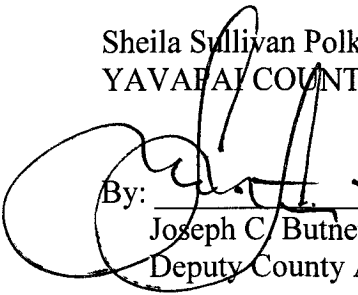
1 an initial matter, the sentence '**There are very few things in this world that we know with**
2 **absolute certainty, and in criminal cases the law does not require proof that overcomes**
3 **every doubt.**' is added to the language from *Portillo* ... and is confusing, given the
4 remainder of the instruction." Memo at p. 4, lines 22-25. As noted above, that specific
5 language is included in the instruction mandated by *Portillo*. The remaining arguments are
6 similarly a blatant attempt to once again mislead this Court for Defendant's own purposes.
7

8 **CONCLUSION:**

9 Defendant's "Memo," which asks this Court to circumvent well-established Arizona
10 law and substitute a federal jury instruction in place of the RAJI Preliminary 19 instruction,
11 should be denied.

12 RESPECTFULLY SUBMITTED this th28 May, 2010.

13 Sheila Sullivan Polk
14 YAVAPAI COUNTY ATTORNEY

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16 By: 
17 Joseph C. Butner
18 Deputy County Attorney
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26 ...

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1 COPIES of the foregoing delivered this
2 28th day of May, 2010 to:

3 Honorable Thomas J. Lindberg
4 Division 6
5 Yavapai County Superior Court
6 (via email)

7 John Sears
8 511 E.. Gurley St.
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10 Attorney for Defendant
11 (via email)

12 Larry Hammond
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15 2929 North Central Ave, 21st Floor
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17 Attorney for Defendant
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IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

Division 6

STATE'S PROPOSED JURY
INSTRUCTIONS

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney,
and her deputy undersigned, hereby submits its proposed preliminary jury instructions.
These instructions are based upon the Revised Arizona Jury Instructions (RAJI (Criminal
3rd).

RESPECTFULLY SUBMITTED this 3d May April, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____

Joseph C. Butner
Deputy County Attorney

STANDARD CRIMINAL JURY INSTRUCTIONS:

- 1
- 2 1 - Duty Of Jury
- 3 2 - Lawyer's Comments Are Not Evidence
- 4 3 - Stipulations
- 5 4 - Evidence To Be Considered
- 6 5a - Presumption of Innocence
- 7 5b(1) - Burden of Proof (complies with *State v. Portillo*, 182 Ariz. 592 (1995))
- 8 6 - Voluntariness of Defendant's Statements
- 9 8 - Character and Reputation of the Defendant
- 10 9 - Flight or Concealment
- 11 15 - Defendant Need Not Testify
- 12 16 - Evidence of Any Kind
- 13 17 - Voluntary Act
- 14 18 - Credibility of Witnesses
- 15 20 - Witness (Prior Conviction)
- 16 21 - Indictment/Information Is Not Evidence
- 17 22 - Lesser-Included Offense
- 18 24 - Direct and Circumstantial Evidence
- 19 25 - Expert Witness
- 20 34 - Testimony of Law Enforcement Officers
- 21 35 - Separate Counts
- 22 36 - Defendant's Testimony

R.A.J.I. DEFINITIONS

- 15
- 16 1.056(a)(1) Intentionally or With Intent to Defined
- 17 1.056(a)(2) Intent – Inference
- 18 1.056(b) Knowingly Defined
- 19 1.058 Dangerous Instrument Defined
- 20 1.0510 Deadly Weapon Defined
- 21 1.0516 Definition of Felony
- 22 1.0536 Definition of Unlawful

STATUTORY CAPITAL CRIMINAL JURY INSTRUCTIONS

- 21
- 22 1.0 Degree of Participation Instruction
- 23 1.1 Eligibility Phase, Nature of the Hearing
- 24 1.2 Duties of the Jury
- 25 1.3 Evidence
- 26 1.4 Burden Of Proof
- 1.5 Definition of Proof Beyond a Reasonable Doubt
- 1.6 Aggravating Circumstances
- 1.6(c) Definition for "Consideration for the Receipt, or in Expectation of the Receipt, of Anything of Pecuniary Value"

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STATUTES

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| 1 | | |
| 2 | A.R.S. § 13-604(I) | - Dangerous and Repetitive Offenders – Definitions |
| 3 | A.R.S. § 13-701 | - Sentence of Imprisonment for a Felony |
| 4 | A.R.S. § 13-702 | - Sentencing – Definitions |
| 5 | A.R.S. § 13-703(A) | - Sentence of Death or Life Imprisonment |
| 6 | A.R.S. § 13-703(F)(5) | - Pecuniary Gain |
| 7 | A.R.S. § 13-703.01 | - Sentence of Death or Life Imprisonment or Natural Life – Definitions |
| 8 | A.R.S. § 13-1101 | - Homicide – Definitions |
| 9 | A.R.S. § 13-1105 | - First Degree Murder – Classification |
| 10 | A.R.S. § 13-1104 | - Second Degree Murder – Classification |
| 11 | A.R.S. § 13-1501 | - Burglary – Definitions |
| 12 | A.R.S. § 13-1508 | - Burglary in the First Degree - Classification |
| 13 | A.R.S. § 13-1507 | - Burglary in the Second Degree - Classification |

STATUTORY DEFINITIONS

- | | | |
|----|------------------|---|
| 14 | A.R.S. § 105(5) | - Definition of “Conduct” |
| 15 | A.R.S. § 105(9a) | - Definition of “Intentionally” |
| 16 | A.R.S. § 105(9b) | - Definition of “Knowingly” |
| 17 | A.R.S. § 105(9c) | - Definition of “Recklessly” |
| 18 | A.R.S. § 105(12) | - Definition of “Deadly Physical Force” |
| 19 | A.R.S. § 105(13) | - Definition of “Deadly Weapon” |
| 20 | A.R.S. § 105(16) | - Definition of “Felony” |

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COPIES of the foregoing delivered this
3rd day of ~~April~~ May, 2010 to:

Honorable Thomas J. Lindberg
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By: 